the jury, informed the trial court that the witness was "in mortal fear of testifying in an open courtroom because threats have been made on his life." (1273-74). The court assured counsel that the courtroom was well protected, and observed that the prosecutor had informed him that the witness had been offered, but had refused, police protection outside the courtroom (1274-75). Counsel reiterated the witness's position that he was willing to testify in a closed courtroom, but would refuse to testify otherwise, and was ready to take the consequences of his refusal (1275). Counsel then stated that the witness worked with four people "from which these threats have emanated" (1276). The court informed counsel that he would direct the witness to testify and would, if the witness refused, take proper steps to punish him (1280). Counsel for petitioner Hayer then observed that if the witness were to refuse to testify, he should be barred from referring, in the presence of the jury, to the threats he had allegedly received (1281-82). It was at this point that the court first spoke to the witness himself (1282):

> The Court: Well, I don't know. Do you know who threatened you?
> Mr. Timberlake: I received telephone calls.
> The Court: Well, do you know who they were?
> Mr. Timberlake: No, I don't.

No further inquiry on this issue was made of the witness, whose sole statement on the subject contradicted that of his counsel, who had informed the court that the threats had emanated from the witness's fellow workers.

After Timberlake himself had been heard from, counsel for petitioner Butler requested that the witness not be called to testify before the jury, since it had become obvious that he would refuse to answer questions (1282). The prosecutor announced that he in-

tended to call the witness, and would, if it became necessary, ask the court to direct him to testify (1282). Counsel for Hayer then stated that if, on the stand, the witness were to state that he had been threatened or that his life was in danger, a motion for a mistrial would be made (1283). Counsel for the witness stated that he and his client had no choice but to state that fact for the record (1283), but the prosecutor assured all that he did not intend to ask the witness the ground of his refusal to testify (1283). A suggestion by the trial court that the witness merely state that he declines to answer on advice of counsel was rejected by Timberlake's counsel on the ground that he had given no such advice (1283-84). Another suggestion by the trial court that Timberlake state that he refused to answer for the reasons already stated on the record was opposed by counsel for petitioner Butler, who noted that this would permit the jury to speculate on the reasons (1284). The prosecutor then suggested that the courtroom be cleared of all spectators in the interest of justice (1285), a suggestion opposed by counsel for all three petitioners (1287). After a luncheon recess, the doors of the courtroom were closed to all spectators and members of the press (1288, 1301). Indeed, so total was the exclusion order that the court refused to permit Timberlake's attorney to be present, unless Timberlake needed advice as to his rights while testifying (1298). The courtroom was closed during Timberlake's entire testimony, and was closed once again during the testimony of F.B.I. Agent John C. Sullivan, to whom Timberlake had delivered the gun, on the theory that Sullivan would be required to refer to Timberlake by name (1768-72). All petitioners objected to the exclusion order (1770-71).

During the course of summations, Timberlake's name and the nature of the testimony he gave were mentioned

by two defense counsel, without objection by the prosecutor or admonition by the court, even though the press and spectators were present (3685; 3741-48; 3755-56). It was only when counsel for petitioner Hayer was summing up that the court, in reply to a question by counsel, stated that the name of the secret witness could not be mentioned (3780).

REASONS FOR GRANTING THE WRIT

This petition presents the question as to what circumstances will justify a trial court in limiting an accused's Fourteenth Amendment right to a public trial.[2]

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[2] In 1928, this Court held that the Sixth Amendment's public trial guarantee does not apply to the states, but declined to decide whether that right was guaranteed by the Fourteenth Amendment. See *Gaines* v. *Washington,* 277 U.S. 81 (1928). Since then, this Court has stated that the right to a public trial is encompassed within the concept of due process. See, e.g.: *In re Oliver,* 333 U.S. 257, 278 (1947) ("[I]t is 'the law of the land' that no man's life, liberty or property be forfeited as a punishment until there has been a charge fairly made and fairly tried in a public tribunal"); *Turner* v. *Louisiana,* 379 U.S. 466, 472-73 (1965) ("In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom . . . ."); *Estes* v. *Texas,* 381 U.S. 532, 538, 560, 588 (1965) ("We start with the proposition that it is a 'public trial' that the Sixth Amendment guarantees to the 'accused' "; "[T]he fundamental conception of a fair trial includes . . . the right to have the proceeding open to the public" [Warren, C.J., concurring]; "The 'public trial' guarantee of the Sixth Amendment . . . reflects a concept fundamental to the administration of justice in this Country." [Harlan, J., concurring].

If there remains any doubt that the Constitution guarantees a public trial to a state accused, this case presents the Court with an appropriate opportunity to resolve it. And that question is presented by a case in which the court below justified a limitation on that right because of facts which no other court has ever deemed sufficient.

Petitioners concede that the right to a public trial is not an absolute right which admits of no limitations. Those cases which have passed upon the issue have permitted limitations on the right in special circumstances. Thus, those who would create disorder and disruption in the courtroom itself may surely be excluded from it. See, *e.g., United States ex rel. Orlando* v. *Fay,* 350 F. 2d 967 (2d Cir. 1965), *cert. denied,* 384 U.S. 1008 (1966).[3] And there may be a limitation on the right during the testimony of an immature witness in a trial involving a sex crime. See, e.g., *Callahan* v. *United States,* 240 Fed. 683 (9th Cir. 1917). Even in such cases, however, the exclusion permitted must not go beyond what is necessary. See, *e.g.: State* v. *Damm,* 62 S.D. 123, 252 N.W. 7 (1933) (one member of the press permitted to remain in the courtroom); *Moore* v. *State,* 151 Ga. 648, 108 S.E. 47 (1921) (defendant's relatives and members of the bar and press permitted to remain); *Callahan* v. *United States, supra* (members of the press permitted to remain). In the present case, however, the exclusion was total during the testimony of Timberlake and Sullivan; not even Timberlake's counsel was permitted to remain.

The law has often had to deal with recalcitrant and contemptuous witnesses and it has dealt with them swiftly and firmly. Rarely, if ever, has such a witness been permitted to dictate terms to the court. Petitioners have found no case, save the one now before this Court, in which an exclusion order, however limited, was made merely because a witness, claiming fear and promising contemptuous conduct, demanded it as his witness fee. The court below has created a

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[3] In the present case, there was no suggestion of any danger of a disturbance in the courtroom.

precedent as dangerous as it is novel, for its ruling virtually grants to a recalcitrant witness rather than to the court the power to determine when an accused's right to a public trial shall be limited.

In ruling as it did, the court below placed great reliance upon *United States ex rel. Bruno* v. *Herold,* 408 F. 2d 125 (2d Cir. 1969), *petition for a writ of certiorari pending as Misc. No. 145, October Term, 1969,* which it found "rather similar in principle." That reliance was misplaced, for there the Second Circuit, with Judge Waterman dissenting, sustained a state judge's order, made without defense objection, excluding from the courtroom all but a few of the spectators in order to permit the continuation of testimony by a witness who was being intimidated by and was "in mortal fear of the 'gang in the courtroom.'" *Id.* at 127. Here, on the other hand, the exclusion was total, was made over petitioners' objection, and had nothing whatsoever to do with the conditions in the courtroom.

The court below also stated that part of the problem was created by petitioners' objection to the trial judge's plan to swear the witness and hold him in contempt if he refused to testify, a plan the court described as the "only alternative" open to the trial judge. Petitioners, however, objected only to permitting the witness to state *before the jury* that his refusal to testify was based on fear or on the fact that he had been threatened. Such a statement would have been highly prejudicial and subject to a motion to strike. See, *e.g., United States* v. *Krulewitch,* 167 F. 2d 943, 947 n. 4 (2d Cir. 1948) *rev'd on other grounds,* 336 U.S. 440 (1949). Petitioners should hardly be faulted for objecting beforehand to a remark which, when made, would have had to be stricken. Nor should they have had to give

up the right to preclude such a prejudicial statement so as to be able to claim error because of the exclusion order. See, *e.g., Simmons* v. *United States,* 390 U.S. 377 (1968). Moreover, the procedure to which petitioners objected was not, as the court below stated, the only alternative open to the trial judge, who could have had the witness sworn in open court *in the absence of the jury,* questioned preliminarily and, if he refused to testify, punished for contempt. This procedure would not only have tested the resolve of the witness, but would also have avoided the prejudice involved in having the jury hear of the threats allegedly made to the witness. The court below also failed to note the fact that the prosecutor could have decided to withdraw the witness, thus ending the problem and the threat to petitioners' rights. Better that the prosecution be deprived of the witness than that petitioners be deprived of a public trial during his testimony.

This case presents to this Court the opportunity to announce a rule essential to the protection of an accused's right to a public trial, i.e., that a trial judge, confronted with a difficult situation such as was presented here, must consider and, if it solves the problem then before him, must adopt a course less drastic than a total exclusion order. In the present case, the judge could have solved the problem by first hearing the witness in a public courtroom outside the presence of the jury. The solution he chose, however, was a total exclusion order. That order therefore violated the Fourteenth Amendment.

Confronted by an allegedly fearful witness who demanded that his testimony be given in a closed courtroom, the trial judge, after considering all the alternatives except the most proper one, capitulated to the

witness and excluded all members of the press and public during the testimony of that witness and of another, whose testimony related to that of the first.[4] No suggestion was ever made that a courtroom disturbance or any intimidation of the witness by spectators was involved. The court below upheld the exclusion order and, in so doing, set a unique and dangerous precedent, one in violation of the Fourteenth Amendment. The issue involved is a most important one, and this Court should therefore review the judgments of the court below.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[4] There was clearly no reason to exclude press and public during the testimony of this second witness, F.B.I. Agent Sullivan, who easily could have refrained from mentioning Timberlake by name. Indeed, it appears clear that the prosecutor had given him instructions to do just that (1771).

APPENDIX

APPENDIX

Opinion

STATE OF NEW YORK: COURT OF APPEALS

No. 369

THE PEOPLE &c., *Respondent*,

v.

THOMAS HAGAN, a/k/a TALMADGE HAYER, a/k/a THOMAS HAYER, NORMAN BUTLER, a/k/a NORMAN 3X BUTLER and THOMAS JOHNSON, a/k/a THOMAS 15X JOHNSON, *Appellants*.

BERGAN, J.:

The proof that defendants participated in the assassination of Malcolm X is abundant. The main question of law presented is whether the exclusion of the press and public from the court room during a small segment of the trial deprived defendants of their right to a public trial. This right is provided both by the Constitution of the United States and by the statutes of New York.

The exclusion occurred during the testimony of a witness, Timberlake, because it was represented to the court that Timberlake believed his life was in danger if he testified publicly and would refuse to testify on this ground. The exclusion included the testimony of an FBI agent relating to Timberlake.

On one hand a trial can be too "public" and defendant be deprived of due process; on the other, it can be too private and defendant be deprived of an open trial. Two Supreme Court cases, each involving a State prosecution, illustrate the extremities of this axis, in one of which (*Estes* v. *Texas*, 381 U.S. 532) there was too much publicity; and the other (*In Re Oliver*, 333 U. S. 257) in which the whole inquisitory

proceeding, including holding the appellant in contempt, was conducted by a State judge completely *in camera*.

In the balancing of policy and of interests if, for a good reason related directly to the management of the trial, the Judge closes the courtroom as to the testimony of a witness and otherwise keeps it open to the press and public, a defendant is not necessarily deprived of a "public" trial.

A very recent case in the Second Circuit, *United States ex rel Bruno* v. *Herold* (— F 2d —, decided February 14, 1969), is rather similar in principle to this one. The prosecution there was for robbery and other crimes. The Trial Judge was informed that a witness for the people "was in mortal fear of the 'gang in the courtroom' " (— F 2d —; p. 3819 in slip decision), and when the witness was sworn the Judge observed thirty or forty people in the court room.

The Trial Judge testified "some of them" grinned and grimaced and the witness "turned white as a sheet". It was the Judge's judgment, based on many years experience, that this was intimidating the witness and so he closed the court room during this testimony.

The Court of Appeals (per Moore, J.) observed (id. 3820-3821): "The Judge had to meet an unusual and unexpected courtroom situation in which the interest of the prosecution, the defendant and the witness equally had to be protected. Discretion * * * had to be exercised by the judge responsible for the conduct of the trial. Thus, petitioner was not in fact denied a public trial. The proof supports a conclusion that there was only a partial exclusion on the first day of trial and none on the second. A Sixth Amendment situation is not reached. There was no *in camera* or secret trial."

In a similar direction is *United States* v. *Fay* (350 F. 2d 967 [Second Circuit]) where it was held that the constitutional right to a public trial is subject to the power of the

Judge to preserve the fairness and orderliness of the proceedings in the court.

The landmark New York case on this question is *People* v. *Jelke* (308 N. Y. 56). It is distinguishable. The public and press were excluded throughout the whole of the People's case. The exclusion had nothing to do with the conduct of the trial or the protection or integrity of the judicial process itself. It was aimed at protecting the public from hearing or reading about the details of a sordid case of offensive obscenity (pp. 60-61).

The ground taken by the Trial Judge, this court held, was not justified in the specifics of the New York statute and ran against the mandate for a public trial (pp. 65-67). It was "not sanctioned by legislation" and "deprived defendant of a substantial right" (Fuld, J., p. 67).

Rather similar to *Jelke* in its policy implications are cases in which it is held that desire of a mature witness to avoid the embarrassment of describing a Mann Act violation in public was not a justification to close the court to the public (*United States* v. *Kobli,* 172 F. 2d 919 [Third Circuit]); or rape (*Tanksley* v. *United States,* 145 F. 2d 58 [Ninth Circuit]).

But the rule is different in the case of a very young girl (*Callahan* v. *United States,* 240 F. 683). Thus, as *United States* v. *Fay* (*supra*) shows, the right to a public trial is subject to the power of the Judge to protect the essentials of the judicial process—in *Fay* interruptions of the trial by defendant and a relative in the court room.

There are differences, of course, between this present case and *Bruno*. In the latter there was no objection to closing the court room and here there was. But, on the other hand, the witness in *Bruno* did not say he was frightened—the Judge surmised it.

Here, the lawyer for the witness Timberlake told the Judge on the record the witness feared for his life and

threats had been made against him and that he would not testify. The Judge suggested that the witness should be sworn and take his chances on refusing to testify; but to this form of proceeding defendants objected. They objected also to the court's order closing the court room to the public. Part of the problem was thus created by the defendants' objection to the only alternative open to the Judge: to swear the witness and hold him in contempt if he refused to testify.

This case, then, is stronger in support of a partial closing of the court than *Bruno*. It is very different from *Jelke*, in which the court was closed for the People's whole case because of the Judge's purpose to protect the public from learning or hearing sordid details. The exclusion of the public in this present case was directly concerned with the judicial process itself.

When the proof given by a large number of witnesses for the People is considered, the testimony taken during the period of exclusion is minimal. It concerned defendant Hagan's fleeing and the recovery of his pistol. But Hagan was captured by a mob of people outside the meeting place and, indeed, himself testified he had shot Malcolm X. Even if there were error in the exclusion, it should be held beyond a reasonable doubt that it was harmless (*Chapman* v. *California*, 386 U. S. 18).

The second main point made by appellants is that it was improper for the prosecutor to comment on and offer evidence of hostility of the Black Muslim faction, to which they belonged, toward Malcolm X. One basis of objection is that this hostility related to religious faith and observance (*Toomey* v. *Farley*, 2 N Y 2d 71, 82); the other is that it tended to snbstitute "collective culpability for a finding of individual guilt" (*United States* v. *Bufalino*, 285 F. 2d 408, 417 [Second Circuit]).

But if, indeed, the murder did grow out of the hostility of a religious conflict, this conflict becomes germane to the

case. It should not be made inadmissible on general grounds. The relevancy of the relationship is to this specific case. The text and cases cited by the People give general support to a concept which, indeed, seems self-evident (2 Wigmore on Evidence, §§ 389, 390 [3rd ed. 1940]; *Sam* v. *State*, 33 Ariz. 383 [1928]; *State* v. *Ling*, 114 Ore. 267 [1924]; *McManus* v. *Commonwealth*, 91 Pa. 57, 66; *Hester* v. *Commonwealth*, 85 Pa. 139, 155).

The pre-trial discovery rulings of the court were not erroneous and the limitations imposed are consistent with New York practice.

The judgments should be affirmed.

* * * * * * * * * *

Judgments affirmed. Opinion by Bergan, J. All concur.

Remittitur of the New York Court of Appeals

COURT OF APPEALS

STATE OF NEW YORK, SS:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 16th day of April in the year of our Lord one thousand nine hundred and sixty-nine, before the Judges of said Court.

WITNESS,

The HON. STANLEY H. FULD,
Chief Judge, Presiding.

RAYMOND J. CANNON, *Clerk.*

BE IT REMEMBERED, That on the 22nd day of July in the year of our Lord one thousand nine hundred and sixty-eight, Thomas Hagan, a/k/a Talmadge Hayer, a/k/a Thomas Hayer, Norman Butler, a/k/a Norman 3X Butler and Thomas Johnson, a/k/a Thomas 15X Johnson, the appellants in this cause, came here unto the Court of Appeals, by Patrick M. Wall, their attorney, and filed in the said Court a Notice of Appeal and return thereto from the judgments of the Appellate Division of the Supreme Court in and for the First Judicial Department. And The People &c., the respondent in said cause, afterwards appeared in said Court of Appeals by Frank S. Hogan, District Attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Court of Appeals having heard this cause argued by Mr. Edward Bennett Williams, admitted pro hac vice, of counsel for the appellants, and by Mr. H. Richard Uviller, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgments of the Appellate Division of the Supreme Court appealed from herein be and the same hereby are affirmed.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

Therefore, it is considered that the said judgments be affirmed, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

Raymond J. Cannon
Clerk of the Court of Appeals of the State of New York

Court of Appeals, Clerk's Office,
Albany, April 16, 1969.

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

Raymond J. Cannon

Opinion

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

Nos. 13001/02/03—*People v. Hagan, et al.*

Memorandum for the List

Judgments convicting defendants of murder in the first degree unanimously affirmed.

Defendants' guilt was overwhelmingly established. And no contention that it was not was advanced. One of the defendants in testimony given on the trial admitted his participation, including shooting the deceased, in unequivocal terms. Reversal is sought on several grounds, only one of which merits any discussion.

During the trial one witness refused to testify unless the courtroom was cleared of spectators and press representatives. He gave as grounds for his refusal his fear of reprisals which had been threatened against him. After considering alternatives, strenuously objected to by counsel for each of the defendants, the court acceded to the witness' request and cleared the courtroom for his testimony and that of another witness whose testimony, purely formal, was related to the testimony of the other. None of us approves the practice followed, and some members of the court believe it to have constituted error. But we are all in accord that it was not error which mandates a reversal. Even if it be assumed that the claimed error is constitutional error, it does not automatically call for reversal (*Chapman* v. *California,* 386 U.S. 18, 23-24; *Fahy* v. *Connecticut,* 375 U.S. 85, 86-87). Here we believe that the prosecution has established beyond a reasonable doubt that the claimed error did not contribute to the verdict obtained. The period of public exclusion was less than three percent of the time taken for trial; and the testimony given was largely cumulative and it is inconceivable that a public hearing as to these witnesses would have induced potential evidence for the defense which the vastly greater publicly given testimony failed to evoke.

April 5, 1968

BRIEF FOR THE RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

October Term, [redacted] 1969

No. 355

TALMADGE HAYER; NORMAN BUTLER, also known as NORMAN 3X BUTLER; and THOMAS JOHNSON, also known as THOMAS 15X JOHNSON,

Petitioners,

versus

THE STATE OF NEW YORK,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

RESPONDENT'S BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

October Term, 1968

No. 355

TALMADGE HAYER; NORMAN BUTLER, also known as NORMAN 3X BUTLER; and THOMAS JOHNSON, also known as THOMAS 15X JOHNSON,

Petitioners,

versus

THE STATE OF NEW YORK,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

RESPONDENT'S BRIEF IN OPPOSITION

Preliminary Statement

This is a petition for a writ of certiorari to the Court of Appeals of the State of New York to review an order of that Court, entered April 16, 1969, which affirmed unanimously a judgment of the Supreme Court of the State of New York, County of New York, entered April 14, 1966,

convicting the three defendants, after trial (MARKS, J., and a jury), of the crime of MURDER IN THE FIRST DEGREE, and sentencing each defendant to life imprisonment.

The defendants are presently serving their terms.

Question Presented

Were the petitioners deprived of their constitutional right to a public trial by the order of the trial judge directing that the courtroom be cleared during the testimony of and relating to one of twenty-three prosecution witnesses who, owing to fear of reprisals, had indicated that he would not testify in open court, and following defense objections to having the jury hear his refusal precedent to adjudicating the witness in contempt of court?

Statement of the Case

On the afternoon of February 21, 1965, in a crowded, upper-Manhattan auditorium called the Audubon Ballroom, Malcolm Little arose to address a gathering of his own newly-founded, Afro-American organization. Malcolm X, as Little preferred to be called, had been a world-renowned leader of a militant Negro religious sect known popularly as the Black Muslims, but he had seceded with a contingent of followers. Bitterness attended the split, and as Malcolm stood before his people, he was seeking to develop an enlightened line of departure.

At that moment, Talmadge Hayer [indicted as Thomas Hagan] and Norman "3X" Butler, Black Muslims who had

waited side by side in the midst of the auditorium, staged a noisy altercation to attract attention to themselves and signal the beginning of the attack. The ruse worked; the two bodyguards of Malcolm X, who had stood near the platform, ran toward the scene of the disorder, leaving the target unprotected. At this point, Thomas "15X" Johnson rose from his front row seat and fired two 12 gauge shotgun shells at Malcolm X. Almost simultaneously, Butler and Hayer raced toward the stage directing a murderous hail of gunfire at the speaker, Hayer firing a .45 calibre automatic pistol, and Butler using a German Luger. After the initial shotgun blast, at least ten shots were fired at Malcolm X. He was hit repeatedly and was pronounced dead shortly after he was taken on a stretcher to Medical Center Hospital, across the street from the Audubon Ballroom.

In the resulting confusion, two of the assassins, Butler and Johnson, escaped from the Ballroom, while the fleeing third defendant, Hayer, was captured by the angry spectators on the sidewalk outside. He was rescued by a police officer, who drove off the crowd and arrested Hayer. Butler and Johnson were later arrested by the police at their homes in the Bronx.

Both Butler and Johnson had known Malcolm X while the latter had been chief minister at Mosque Number 7, the Black Muslim temple located in Harlem. After his departure to go his own way, Malcolm X was reviled by Elijah Muhammad's Black Muslims and, obediently, many members of Mosque Number 7, including Butler and Johnson, considered him to be a "hypocrite." Indeed, some members expressed the wish that he be killed.

Both Butler and Johnson occupied positions of considerable power within the organization of Mosque Number 7, Butler being the leader of a group known as "the enforcers." It was the function of this group to see that the "policy" of the organization was obeyed, and, on occasion, to employ violent measures to that end.

At the trial, several witnesses who had previously seen Butler and Johnson at meetings in the Harlem Mosque, identified both men as having been present in the Audubon Ballroom on the day of the assassination. Several saw them fire the shots which mercilessly cut down Malcolm X. Their testimony directly controverted that of Johnson, Butler, and their wives and friends who insisted that the defendants were in their homes at the time of the killing.

As to Talmadge Hayer, who was active in Mosque Number 25 in Newark, there was also eyewitness evidence of his role in the assassination. In addition, there was solid testimony that he discarded his automatic pistol, one of the murder weapons, as he fled the Ballroom; it was recovered by a bystander (Timberlake), who turned it in to the FBI. When he was saved from his captors by his arrest, Hayer initially admitted his presence in the Ballroom, but denied any part in the slaying. His exculpatory account was repeated from the witness stand in his own defense, but later during the trial, he suddenly resumed the stand and dramatically admitted his participation in the murder. He submitted, as the sole reason for changing his story, his compunction at seeing Johnson and Butler, who he claimed were innocent men, unjustly convicted. He gave the same basic account of the plan of assassination as that related by the People's witnesses, denying only that

his co-defendants had been his accomplices. He carefully disavowed any association with the Black Muslim organization, and stated that his motive in participating in the plot to kill Malcolm X was an offer of money. He refused to reveal the identities of those who had acted with him or of the individual who had offered him money to participate in the killing.

The eyewitness evidence marshaled by the People below came from many persons with different vantage points on the day of the assassination. Cumulatively, the testimony of these witnesses was "abundant," as the Court below noted, that all three defendants shot and killed Malcolm X on February 21, 1965. And the petitioners have not challenged the truth of the verdict, or the sufficiency of the evidence supporting it. Their sole contention involves the following trial occurrance:

During a short recess between the testimony of prosecution witnesses, Mr. W. Eugene Sharpe introduced himself to the court as the attorney for one Ronald Timberlake, who was to be the next witness. He told the court that his client wished to continue to cooperate with the prosecution, but that he was "in mortal fear of testifying in an open courtroom because threats have been made on his life consistently since the incident which is at issue here at trial" (1273-4).* The court undertook to assure Timberlake that security measures had been taken in the courthouse, referring, presumably, to the fact that all spectators were being searched for weapons before being admitted to the courtroom (166-7). When Mr. Sharpe suggested that his client would be placing himself in grave danger outside the court-

* References, unless otherwise indicated, are to pages of the record on appeal to the New York Court of Appeals.

room, the judge said he had been told by the district attorney that Timberlake had declined an offer of police protection. He renewed the offer, but on behalf of his client, Mr. Sharpe declined the protection as inadequate. Extremely reluctant to clear the courtroom which he thought would be "flying right in the face of" a decision of the Appellate Division of the Supreme Court of New York (1278), the judge sought to persuade Mr. Sharpe to change his position. Mr. Sharpe simply advised the court that the decision was Timberlake's: if the courtroom were not cleared, he would not testify though he be directed to do so on pain of contempt. For his part, Mr. Sharpe tried to persuade the court that the matter was one of discretion, and the court should, in the circumstances, exercise its discretion in favor of exclusion (1278). In this impasse, the court ruled that the witness would have to take the witness stand, make his refusals, and accept the consequences. This resolution, however, was unacceptable to the defendants, who objected in concert, citing the prejudicial effects of a steadfast refusal of a fearful witness to testify, played out in the jury's presence (1281-7). Thereupon, the court recessed for lunch.

When the court reconvened for the afternoon session, Judge Marks ordered all spectators and press excluded during the taking of testimony from Timberlake (1288). Elaborating upon his ruling, the court quoted from the opinion of Judge FULD in *People* v. *Jelke* [308 N.Y. 56, 63 (1954)] to the effect that the statutory right to a public trial, although a basic privilege, has never been viewed as "imposing a rigid, inflexible strait jacket on the courts. It has uniformly been held to be subject to the inherent power of the court to preserve order and decorum in a courtroom, to protect the rights of parties and witnesses,

and generally further the administration of justice'' (1289). The court found Timberlake sincere in his belief that he was in mortal peril, and further, decided that the witness would persist in his refusal to testify in a public courtroom, thus thwarting the proper administration of justice. Accordingly, the court felt itself warranted in exercising its inherent power to exclude (1290-1).

Later in the presentation of the People's case, an agent of the Federal Bureau of Investigation, John C. Sullivan, was called. He had interviewed Timberlake on the day of the murder and had received from him a gun which Timberlake recovered at the scene (Exh. 12). To accord the jury a fair and complete account of this aspect of the case, Sullivan would of necessity be required to mention Timberlake's name, so that his evidence could be considered along with Timberlake's. Hence the court, consistently, excluded the press and public during Sullivan's testimony to make meaningful the protection accorded to Timberlake (1768-72).

ARGUMENT

No substantial federal question is presented by the exclusion of the public during the testimony of the witness Timberlake and of Agent Sullivan.

The minimal exclusion of the public during the petitioners' trial, dictated by the particular exigencies of a special crisis, raises no constitutional issue of importance or of general pertenance. The constitutional derivation of the right to a public trial has been announced repeatedly by this Court and accepted by the Court below. At the same time, the petitioners have conceded that the right is

not absolute, but subject to application appropriate to the situation. The only question they seek to place before this Court is whether the trial court in the present case exceeded the demands of necessity in excluding the public. The issue, therefore, is narrow and highly particular. Moreover, since the decision below fully comports with reason and fairness, and represents a correct and just understanding of controlling constitutional precepts, there is no sound basis for granting review by certiorari.

As the Court below found, and as the record amply demonstrates, the trial court was confronted during the trial with a real dilemma, occasioned in part by the position taken by the defendants opposing the only alternative available to the court. Having been informed that a prosecution witness would not testify in open court, the trial judge was prepared to place him on the stand, notwithstanding his fears, and hold him in contempt if he persisted in his refusal. To this course, the defense objected strenuously.

Petitioners now argue, in a key contention, that other methods of dealing with the crisis were available to the trial judge. Principally, they urge that the judge should have sworn the witness in the absence of the jury and tested his resolve, holding him in contempt if he stood fast (brief, pp. 8-9). The odd procedure proposed is of dubious legality. First it is doubtful whether the court could have sworn the witness in the jury's absence to give trial evidence. Even if he did so, the interrogation which followed would clearly be no part of the trial, and accordingly, any refusal by the witness to answer could hardly be deemed contumacious, since he was under obligation only to testify at

the trial. Moreover, if the witness, under these circumstances, weakened in resolve and offered evidence, it would not be before the jury, and hence valueless. Thus, the superficial appeal of the petitioners' proposal dissipates on closer, realistic appraisal.

Equally tenuous is the petitioners' other suggestion as to how the impasse might have been resolved without exclusion of the public during Timberlake's account. He simply says the prosecution might have withdrawn the witness and done without his testimony (brief, p. 9). Better, he claims, to deprive the prosecution of a witness than than to deprive the defendants of a public trial. Patently, his argument oversimplifies and distorts the issue. The People and the jury were entitled to the evidence furnished by Timberlake, as they are to all relevant and probative proof. Although much of the witness' testimony simply added to accounts of other witnesses, he did have something unique to offer: it was through him that the jury learned of the recovery of one of the murder weapons. Perhaps his testimony contributed to Hayer's decision to confess his guilt from the witness stand. But even if his testimony were purely cumulative, the prosecution was under no obligation to withdraw him on account of his fear or recalcitrance.

Nor do the petitioners fairly state the case when they pose the issue in terms of the trial court's "capitulation" to the wishes of a witness. The witness did not "dictate" the procedure, nor did the court abdicate responsibility, abjectly tendering Timberlake his demanded "witness fee" (brief, pp. 7-8). The court acter reasonably and properly

in the exercise of discretion to promote the ends of justice and protect the rights of the parties. Even without the threat of a disturbance in the courtroom itself, the court surely had the power to enforce a minimal exclusion for a proper purpose.

If, as cannot be doubted, a trial judge may exclude the public in deference to the possible embarrassment which a witness might suffer in relating the details of a sex case, who can doubt the authority of the court to take the same expedient to protect the life of a witness? The nature of the present case was such that the court had already expressed concern about hostile persons who might sit undetected among the spectators. The unusual precaution of searching all members of the public before admittance was surely no empty ritual. Beyond the record, it is fair to assume that the court had some reason to believe that partisans, who had already demonstrated that violence was within their organization's repertoire, might infiltrate the audience. And the mass media coverage could be expected to reach some who might be similarly disposed. Under these circumstances, the court might well conclude the witness' timidity was well-founded. Even the bare possibility of a justified fear warranted minimal measures of protection. Clearly, then, the court's reasonable concern for the future safety of a witness provides a legitimate purpose for the order of exclusion.

A second purpose, equally valid, warranted the action taken. Among the basic responsibilities of the trial court must be counted encouraging the production of material evidence. While the use of the contempt power is available to counter recalcitrance, it is not the only device in

the court's quiver, and frequently not the most effective. The present case is an instance in point. While Timberlake might have been made to pay for his fear with thirty days, the jury would not have thereby acquired the evidence he had on the issue before them. Indeed, to the extent that such evidence might have benefited the defendants' case, they too might have suffered. Moreover, they voiced their claims of prejudice at the procedure which the court would have had to follow to impose the sanction of contempt. Under these circumstances, the election of the court represented the lesser of evils, and the course consistent with the primary objective of a trial: the submission of all relevant and material evidence to the jury.

Of enormous significance in the present case, and wholly neglected by the petitioners in their argument, is the minimal scope of the exclusion. Timberlake was only one of some twenty-three prosecution witnesses. His testimony on direct examination occupied but 144 pages of a 4414 page record. The courtroom was closed only three days out of a three-month trial. Moreover, the evidence Timberlake gave, as reiterated by Agent Sullivan, while materially describing the recovery of one of the murder weapons, was but one stitch in the fabric of a proof which convicted the defendants. Although the beneficial effects of public presence in general cannot be gainsaid, it is highly dubious that particular benefit was lost to the defendants here by total exclusion for such a limited time. The point upon which petitioners so heavily rely is, in these circumstances, no more than an academic quibble. No principle of public trial was sacrificed in this miniscule ban, no prejudice was suffered warranting the overturn of the jury's just verdict,

predicated, in overwhelming proportion, on evidence adduced in the full light of unrestricted public attendance.

Evidently, all that petitioners offer this Court is an "opportunity to announce a rule" that a trial court, confronted with a difficult situation, must "consider" and adopt, if possible, a course less drastic than total exclusion of the public (brief, p. 9). We submit that there is neither the need nor the opportunity to announce such a rule. The "rule" petitioners seek is self-evident, undisputed, and thoroughly understood. No thoughtful trial judge would intentionally adopt a more drastic exclusion—with possible jeopardy to constitutionally protected rights—than the circumstances require. And, since the trial judge quite clearly did not exceed necessity here, the instant case affords no proper vehicle for the promulgation of such a "rule," even assuming the national jurisprudence stood in need of it.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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